In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1644

J. B. GUNN,
Petitioner,

vs.

MICHAEL D. POULIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner, Warden J. B. Gunn, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 24, 1977, and modified on March 30, 1977.

OPINIONS BELOW

The modified opinion of the Court of Appeals, as yet unreported, is appended hereto as "Appendix A." The order of the United States District Court for the Northern District of California, also unreported, is

appended hereto as "Appendix B." The opinion of the California Court of Appeal affirming Poulin's conviction is reported at 27 Cal.App.3d 54, 103 Cal.Rptr. 623. The unpublished opinion of the Court of Appeal dismissing Poulin's petition for a writ of habeas corpus is appended hereto as "Appendix C."

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1). The amended opinion and judgment of the United States Court of Appeals for the Ninth Circuit was filed March 30, 1977. This petition was filed within 90 days thereafter.

QUESTION PRESENTED

Whether a failure to object to evidence admitted at trial which waives a federal claim on appeal under California Evidence Code section 353 and Federal Rule of Evidence 103, precludes review on federal habeas corpus.

STATUTES INVOLVED

Federal Rule of Evidence 103:

"(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

"(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific

ground of objection, if the specific ground was not apparent from the context; . . . .

"(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

California Evidence Code section 353:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

"(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

"(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

STATEMENT OF THE CASE

A. Proceedings in the State Courts

By an information filed on January 20, 1971, the San Mateo County District Attorney accused Michael D. Poulin of willfully and maliciously exploding a destructive device causing great bodily injury, potentially a capital offense under California Penal Code section 12310 (CT 3-4).

Poulin pleaded not guilty (CT 5), was tried by a jury (CT 7-21), and, on March 11, 1971, found guilty

as charged (CT 31, 35). After waiving jury trial as to the penalty, the defendant was sentenced to life imprisonment by the court (CT 32-34).

Poulin appealed to the state Court of Appeal. At the direction of the California Supreme Court, the Court of Appeal entertained Poulin's habeas corpus petition in conjunction with his appeal. In both Poulin asserted the incompetency of counsel. Poulin also moved to produce on appeal additional evidence of counsel's incompetence. On July 12, 1972, the Court of Appeal denied this motion because Poulin refused to waive the attorney-client privilege so that his lawyer might explain his conduct at trial. Appendix C.

On July 12, 1972, the Court of Appeal also affirmed Poulin's conviction after considering the competency of counsel claims raised by the appeal and the habeas petition.

Poulin renewed his attack upon trial counsel in a habeas corpus petition filed in the California Supreme Court on June 28, 1973, and denied without opinion on August 16, 1973.

B. Proceedings in the Federal Courts

On May 9, 1975, Poulin petitioned the District Court for a writ of habeas corpus. An Order to Show Cause issued on October 28, 1975. Warden Gunn filed a Return on November 21, 1975; Poulin replied on December 8, 1975. The District Court denied the petition and dismissed the action on April 6, 1976, and issued a certificate of probable cause for appeal on May 4, 1976.

On February 24, 1977, the United States Court of Appeals for the Ninth Circuit reversed the judgment of the District Court and remanded the case for an evidentiary hearing. On March 30, 1977, the Court of Appeals denied the warden's petition for rehearing and modified its opinion.

C. Statement of the Facts

Wanda Sharon Greene met and became intimate with Michael Poulin between April and August of 1970 (RT 85, 76, 110). On September 3, 1970, Sharon refused to accompany Poulin to the Russian River, explaining that she was seeing Hugh Towzey that evening (RT 88). At 5 o'clock the next morning Poulin was pounding on Sharon Greene's door. After Poulin refused to leave Sharon called the police, who persuaded him to withdraw (RT 89). Five minutes later Poulin telephoned Sharon, threatening "I hope you know what you're doing, baby, because you'll regret it." (RT 90).

On September 8, Poulin waited for Sharon outside her place of employment, forced her into his car, drove to her apartment, and made her telephone her employer that she would not return that day (RT 90-91). He copied Hugh Towzey's address and phone number from Sharon's address book (RT 91) Telling Sharon that if she valued her family and her life she must do as he said, Poulin forced her to drive to his San Jose apartment (RT 92). There Poulin told her she would be lucky to leave in one piece (RT 93), that he had arranged for someone to harass her (RT

95), and that she would be safer with him as there had been many bombings (RT 106). She reported this incident to the police (RT 96).

During the following month Poulin continually followed and telephoned Sharon (RT 96). She changed her telephone number but he learned it from "friends in the telephone company." (RT 100). He said that his love had turned to hate, that he could hurt her most by hurting those she loved (RT 100), that she could not hide from him and that he would exact retribution (RT 101-102). Poulin warned that Sharon's son, parents, or grandparents could suffer (RT 283).

On September 15, 1970, Poulin attempted to run Sharon Greene's automobile off the road (RT 97).

Poulin threatened Sharon's stepfather Leonard Clarenbach (RT 104), and constantly parked across the street from the Clarenbach's home (RT 40-43). He denied knowing Sharon to investigating police officers (RT 169-70, 177-78).

On October 1, 1970, Hugh Towzey's auto was bombed (RT 502).

Poulin continued to harass Sharon, she complained to the authorities, and he was directed by the court to desist (RT 148, 971-973).

On December 16, 1970, Poulin approached Sharon in a gas station. He voiced concern over a January court appearance occasioned by her complaint. She replied that she could do nothing about it as her stepfather was assisting her and the district attorney was advising her (RT 105-106, 974).

Two days later Leonard Clarenbach, leaving home for work, picked up a paper carton in his driveway (RT 16). It exploded in his face, knocking him 20 feet, injuring both ears and his right eye (RT 19-20). Luckily, 10 ounces of C-4 plastic explosive placed in the bomb failed to detonate (RT 334-335, 344).

The switch used in the bomb was purchased three days earlier by Poulin, who admitted attempting to alter its identification number (RT 311-313, 429, 845). Wire recovered from Poulin's apartment matched that found in the bomb (RT 328, 343-44). Michael Adams, a former cellmate of Poulin, testified that in January, 1971, Poulin had asked him to place another bomb in Towzey's car, stating that he had warned him once and now wanted him done away with for good (RT 568, 570). Poulin also asked Adams "to put a knife" in the chest of his girlfriend's child (RT 573).

Poulin denied threatening Sharon, soliciting Adams, or bombing Towzey's car or Leonard Clarenbach (RT 816-819).

On rebuttal, court bailiff William Windle testified that while Clarenbach drew a picture of the bomb, Poulin remarked to his attorney "It was not quite like that." (RT 982). Windle was seated next to the jury when he heard Poulin's comment (RT 981).

REASONS FOR GRANTING THE WRIT

Michael Poulin asks the federal courts to overturn his 1971 state bombing conviction because it was based on allegedly inadmissible evidence to which he did not object at trial. In *Davis v. United States*, 411 U.S.

233 (1973), this Court assimilated the waiver standard for federal appeals and collateral attack, recognizing that relaxation on habeas corpus of the standard prescribed by Federal Rule of Criminal Procedure 12(b)(2) would frustrate the purpose of that rule. In *Francis v. Henderson,* 425 U.S. 536 (1976), the Court extended the *Davis* rule to state prisoners seeking federal habeas corpus for reasons of comity and the orderly administration of criminal justice.

The United States Court of Appeals for the Ninth Circuit has confined *Davis* and *Francis* to pretrial objections "to grand jury composition." Appendix A. This decision is wrong because Poulin's failure to object at trial waived his federal claim on appeal under the standards set forth in California Evidence Code section 353 and Federal Rule of Evidence 103. It is anomalous and self-defeating to apply a different waiver standard on federal habeas corpus. Accordingly, a habeas applicant must explain his failure to object before the State is obliged to present in federal court in 1977 evidence disproving this federal claim which was readily available at his 1971 state trial. It cannot be the State's burden, as held by the Ninth Circuit, to prove the petitioner deliberately bypassed state procedures for the State of California should not be required to prove the state of mind of the defendant or his attorney. The refusal of the Ninth Circuit to apply the *Davis-Francis* rule to trial objections, in light of Federal Rule of Evidence 103 and California Evidence Code section 353, places an intolerable strain upon federal courts, federal-state relations, and the orderly administration of criminal justice.

ARGUMENT

FAILURE TO OBJECT TO EVIDENCE ADMITTED AT TRIAL WHICH WAIVES A FEDERAL CLAIM ON APPEAL PRECLUDES REVIEW ON FEDERAL HABEAS CORPUS.

Poulin's 1975 federal habeas corpus petition challenged his 1971 state conviction on the ground, *inter alia,* that it was based upon inadmissible testimony by an eavesdropping courtroom bailiff repeating an incriminating remark made by petitioner to his attorney during trial, overheard in violation of an attorney-client privilege protected by the Sixth Amendment. (R 20-23). No objection was made to the bailiff's testimony at trial or during Poulin's motion for a new trial (RT 981-983, 997-1000). Although attacking retained trial counsel as constitutionally inadequate for other reasons (R 23-25), the petition does not allege as incompetent his failure to object to the bailiff's evidence.[1]

The District Court rejected all claims and denied the petition (R 93-95; 225-226). Finding his "other

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[1]On his state appeal, Poulin did denounce counsel's failure to object as incompetent. The state appellate court rejected his claim, reasoning that since the challenged statement was not privileged, objection would have been hopeless, even harmful. 27 Cal.App.3d at 67; 103 Cal.Rptr. at 632. The Ninth Circuit held that the state trial record did not furnish an adequate basis for determining that no attorney-client privilege attached.

We recognize that a State may, by considering federal claims in its own courts, waive a procedural default. *Lefkowitz v. Newsome,* 420 U.S. 283 (1975). However, the state appellate court's action cannot waive petitioner's procedural default because his failure to object produced the bare record which prevented authoritative state court disposition of the merits. *Contrast Lefkowitz v. Newsome,* where the state conducted a hearing on the federal claim it asserted was later waived by a guilty plea. In short, a federal court may not penalize the state for its attempt to consider a federal claim, made futile by the claimant's failure to provide any adequate record. To hold otherwise is to encourage forum shopping by defendants and to discourage state court vindication of federal rights.

contentions are wholly without merit," the Court of Appeals reversed and ordered an evidentiary hearing to determine "whether the communication [recounted by the bailiff] was indeed made in confidence, . . . [and] whether Poulin's remarks could be heard and gestures seen by the jury or any other person." Appendix A. A hearing was necessary, the court explained, because "the record is bare on this point." Appendix A. The Court of Appeals further concluded that no "tactically-inspired, or otherwise deliberate, by-pass of state procedures" could be inferred from Poulin's failure to object at trial. Appendix A. The warden's argument that this omission constituted a procedural default which Poulin must explain was rejected on the theory that this Court's decisions in *Francis v. Henderson,* 425 U.S. 536 (1976), and *Davis v. United States,* 411 U.S. 233 (1973), "were confined to pretrial objections to grand jury composition." Appendix A.

The State of California contends that *Francis, Davis, Estelle v. Williams,* 425 U.S. 501 (1976), Federal Rule of Evidence 103, and California Evidence Code section 353 compel the contrary conclusion that petitioner's failure to object constitutes a waiver foreclosing consideration of his claim on collateral attack.

This Court held in *Davis* that a federal defendant's failure to assert constitutional claims before trial as required by Federal Rule of Criminal Procedure 12 (b)(2) constituted a waiver. The Government was thus excused on collateral attack from proving that the accused's omission amounted to a "deliberate by-pass," *Henry v. Mississippi,* 379 U.S. 443, 449-452

(1965); instead, the petitioner was required to show cause for his failure to object. 411 U.S. at 239 n.6, 242.

Having assimilated the waiver standards on direct and collateral review, this Court then concluded in *Francis* that "considerations of comity and concerns for the orderly administration of criminal justice," 425 U.S. at 539, demand that "the rule of *Davis v. United States* applies with equal force when a federal court is asked in a habeas corpus proceeding to overturn a state court conviction. . . ." *Id.* at 542. " 'There is no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.' " *Ibid.* Accordingly, a state prisoner could attack his conviction on federal habeas corpus only upon showing "cause" for his failure to assert his federal claim pursuant to established state procedures and upon showing "actual prejudice." *Ibid.*

Dissenting, Mr. Justice Brennan noted that Mr. Justice Stewart's opinion for the Court in *Francis* made no effort "to distinguish the failure to challenge the composition of a grand jury within the time limits specified by a state's procedural rules from such other situations involving fundamental rights as . . . the failure to challenge in a timely manner the introduction of unconstitutionally seized evidence. . . ." *Id.* at 546. This view of *Francis* gains substance from the concurring opinion of Mr. Justice Powell, joined by Mr. Justice Stewart, in the companion case, *Estelle v. Williams,* 425 U.S. 501, 514-515 (1976):

"This case thus presents a situation that occurs frequently during a criminal trial—namely, a defendant's failing to object to an incident of trial that implicates a constitutional right. As is often the case in such a situation, a timely objection would have allowed its cure. As is also frequently the case with such trial-type rights as that involved here, counsel's failure to object in itself is susceptible of interpretation as a tactical choice.

. . .

"It is my view that a tactical choice or procedural default of the nature of that involved here ordinarily should operate, as a matter of federal law, to preclude the later raising of the substantive right." (Footnotes omitted.)

Poulin failed to object at his state trial to the evidence he now challenges on federal habeas corpus. Then, as now, California Evidence Code section 353 provided:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and (b) the court which passes on the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."[2]

[2]A "miscarriage of justice" is declared where the reviewing court concludes that, absent the error, a verdict more favorable to the defendant appears reasonably probable. *People v. Watson*, 46 Cal. 2d 818, 836, 299 P.2d 243, 254 (1956).

The evident and legitimate purposes served by this contemporaneous objection rule are to permit trial courts to avoid errors necessitating retrials and to afford prosecutors timely opportunity to present alternative proofs.

Federal Rule of Evidence 103 contains "similar provisions . . . [to] California Evidence Code §§ 353 and 354." Notes of Advisory Committee on Proposed Rules. As pertinent, Rule 103 provides:

"(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

"(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. . . .

"(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

In *Davis v. United States*, 411 U.S. at 242, this Court said of Rule of Criminal Procedure 12:

"We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of 'cause' for relief from the waiver, nonetheless intended perversely to negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas corpus proceedings."

For the reasons given in *Davis* the waiver standard expressed in Federal Rule of Evidence 103 must govern an untimely claim of erroneous admission of evidence both during a federal criminal trial and on subsequent collateral attacks. For the reasons given in *Francis* California's similar statutory waiver provision is entitled to equal deference in federal courts.

Rule of Criminal Procedure 12(f) forgives procedural defaults for "cause shown;" Rule of Evidence 103(d) preserves "plain errors." Whether a State may claim a procedural default where federal "plain error" appears may be doubted.[3] California makes no such claim here. To the extent it is definable, "plain error" must (1) appear from the trial record and (2) seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Atkinson,* 297 U.S. 157, 160 (1936); Wright, Federal Practice and Procedure, § 856 (1969 ed.). "Plain error" means "error both obvious and substantial." *Sykes v. United States,* 373 F.2d 607, 612 (5th Cir. 1966).

Error plain enough to appear to a reviewing court is plain enough to alert the trial court to the need for remedial action. Accordingly, the purpose of a contemporaneous objection rule is not frustrated by the failure to object. However, error in admitting the bailiff's testimony at petitioner's trial does not appear from the face of our record. On the contrary, the Court of Appeals, acknowledging the barren record, ordered an evidentiary hearing to determine if

[3]See 21 Crim.Law.Rptr. 4012-4013 (1971), recounting oral argument in *Wainwright v. Sykes,* No. 75-1578.

any error occurred. Poulin's failure to object denied the state trial judge the opportunity to protect the record. "Plain error" thus does not appear. *Sykes v. United States,* 373 F.2d at 612.

In some instances a federal habeas petitioner might avoid the consequences of Rule 103 or its state analogue by alleging that his attorney's failure to object denied him constitutionally adequate assistance of counsel. Poulin has not made this allegation in his federal habeas corpus petition, however. This omission is significant because such a claim was made on his behalf by appellate counsel in the state court. Poulin's failure to renew that contention and his past refusal to waive his attorney-client privilege, Appendix C, suggest an inability to furnish testimony showing a violation of the privilege. Unhappily, the Court of Appeals has held that petitioner is entitled to an evidentiary hearing on the merits of his claim which may require the testimony of the trial judge, twelve trial jurors, the prosecutor, the bailiff, the court reporter, the defense counsel, the victim (who was testifying at the relevant moment), the petitioner, and "any other persons" present, Appendix A, without alleging, much less proving by preponderant evidence, that counsel was incompetent for failing to object. Could Poulin amend his petition, a hearing on counsel's competencey would require far fewer witnesses and far less federal court time.

Finally, the State submits that the "plain error" doctrine may not excuse a federal petitioner's failure to object at his state trial to evidence of unquestionable reliability, the exclusion of which diminishes

rather than enhances the integrity of the fact-finding process. See *Brewer v. Williams,* 45 U.S.L.W. 4331, 4334 (1977) (Dissenting opinion of the Chief Justice); *Schneckloth v. Bustamonte,* 412 U.S. 218, 250 (1973) (Concurring opinion of Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist); *Kaufman v. United States,* 394 U.S. 217, 231 (1969) (Dissenting opinion of Mr. Justice Black); Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142 (1970).

CONCLUSION

The "deliberate by-pass" doctrine is an anomaly. Customarily, the burden of proof must be shouldered by the party having knowledge of the relevant matter. *Fay v. Noia,* 372 U.S. 391 (1963), and *Henry v. Mississippi,* 379 U.S. 443 (1965), misplaced this burden requiring the government to prove by preponderant evidence the state of mind of the accused and his attorney. *Davis v. United States* and *Francis v. Henderson* at last put the burden of proof where it belongs.

Beyond reallocating the burden of proof, *Francis* realigns federal-state relations. The Court of Appeals' order directing a reconstruction in federal court of petitioner's state court trial simply because Poulin voiced no objection six years earlier is in conflict with the concept of federalism accepted in *Francis* and, therefore, should be reversed.

Dated, San Francisco, California,
May 20, 1977.

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
For the Ninth Circuit

No. 76-2012

Michael D. Poulin,
Petitioner-Appellant,
vs.
J. B. Gunn, Warden,
Respondent-Appellee.

[Filed Feb. 24, 1977]

Appeal from the United States District Court
for the Northern District of California

OPINION

Before: CHAMBERS and CHOY, Circuit Judges, and BELLONI,* District Judge.

PER CURIAM:

In his petition for habeas corpus relief, Michael Poulin claims that the incriminating in-court statements to which the bailiff testified were made in confidence to his attorney, and were overheard through the bailiff's eavesdropping. Although the record is bare on this point, if this is true, petitioner's Sixth

*The Honorable Robert C. Belloni, United States District Judge, for the District of Oregon, sitting by designation.

Amendment rights may have been violated. *Hoffa v. United States,* 385 U.S. 293 (1966); *Black v. United States,* 385 U.S. 26 (1966); *United States v. Choate,* 527 F.2d 748, 751 (9th Cir. 1975), *cert. denied,* 425 U.S. 971 1976); *United States v. Zarzour,* 432 F.2d 1, 3 (5th Cir. 1970).

In this case, it is not possible to say that the bailiff's testimony was harmless beyond a reasonable doubt, *Chapman v. California,* 386 U.S. 18, 24 (1967), or that there is no "reasonable possibility that the evidence . . . might have contributed to the conviction." *Fahy v. Connecticut,* 375 U.S. 85, 86-87 (1963). We are also unable to conclude that Poulin "waived" this question by his failure to object to introduction of the testimony at trial. The question is of constitutional dimensions and there is no suggestion that the failure to object amounted to a tactically-inspired, or otherwise deliberate, by-pass of state procedures. *Carmical v. Craven,* 457 F.2d 582, 584 (9th Cir. 1971), *cert. denied,* 409 U.S. 929 (1972). *See Henry v. Mississippi,* 379 U.S. 443, 449-52 (1965); *Fay v. Noia,* 372 U.S. 391, 438-39 (1963).

Since Poulin's other contentions are wholly lacking in merit, the cause is remanded to the district court for findings on the narrow question whether the bailiff in the California Superior Court improperly or illegally eavesdropped on petitioner and his attorney in court. In addition, the district court should determine whether the communication was indeed made in confidence, or whether petitioner was engaging in courtroom histrionics for the benefit of the jury. For

this purpose it should determine whether Poulin's remarks could be heard and gestures seen by the jury or any other persons.

If the bailiff improperly overheard the remarks to which he testified, *and* petitioner's remarks were said in a manner calculated to preserve attorney-client confidentiality, the cause should be remanded to the state courts for a new trial. If petitioner fails to carry the burden of proving his allegations, the district court should deny the petition for habeas corpus.

REVERSED AND REMANDED.

United States Court of Appeals
For the Ninth Circuit

No. 76-2012

Michael D. Poulin,
Petitioner-Appellant,
vs.
J. B. Gunn, Warden,
Respondent-Appellee.

[Filed Mar. 30, 1977]

ORDER

Before: CHAMBERS and CHOY, Circuit Judges, and BELLONI,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. The petition for rehearing is denied.

However, the opinion of the court filed herein on February 24, 1977 is amended by adding thereto at page 2, line 10 (slip opinion page 111, column 1, bottom line), after ". . . (1963)." a new footnote 1 reading as follows:

> The state protests that to overcome a failure to object properly at trial the prisoner must show "cause" for the failure as well as "actual prejudice", calling our attention to Francis v. Henderson, 425 U.S. 536 (1976), which it suggests overruled *Fay, Henry,* and *Carmical, supra,* sub silentio. But *Francis*—as well as its progenitor, Davis v. United States, 411 U.S. 233 (1973)—were confined to pretrial objections to grand jury composition. *See* 425 U.S. at 542; 411 U.S. at 242. Moreover, nothing in *Francis* purports to overrule *Fay,* sub silentio or otherwise; quite the contrary, the Court cites that prior case with approval. 425 U.S. at 539.

*The Honorable Robert C. Belloni, United States District Judge, for the District of Oregon, sitting by designation.

Appendix B

In the United States District Court for the Northern District of California

C-75-0922 RHS

Michael D. Poulin,
Petitioner,
vs.
J. B. Gunn, Warden,
Respondent.

[Filed Apr. 6, 1976]

ORDER

The petition for a writ of habeas corpus challenges petitioner's state-court conviction for exploding a destructive device causing great bodily injury. Petitioner contends there was no evidence the victim suffered great bodily injury, but there *was* substantial evidence of such injury to the victim. Petitioner contends the trial court improperly received testimony from the bailiff, but this Court sees no violation of petitioner's rights in the admission of such testimony. Petitioner contends his trial counsel was constitutionally inadequate because counsel didn't present a diminished capacity defense, but that defense is unavailable to those charged with the crime with which petitioner was charged.

Therefore, it is hereby ordered that the petition and action are dismissed, pursuant to 28 U.S.C. §1915(d). A judgment in accordance with that order will be entered. If petitioner wishes to appeal from that judgment, he must file a timely notice of appeal in the proper format. Petitioner may proceed on appeal *in forma pauperis.* If petitioner files a notice of appeal, this Court, after the filing, will entertain a timely request for a certificate of probable cause. Contrary to petitioner's letter of March 25, 1976, the aforementioned judgment that is to be entered is the only judgment in this case. Thus, that letter will *not* be deemed a notice of appeal.

Dated: April 5, 1976

/s/ Robert H. Schnacke
Robert H. Schnacke
United States District Judge

Appendix C

(NOT TO BE PUBLISHED IN OFFICIAL REPORTS)

In the Court of Appeal
State of California
First Appellate District

DIVISION FOUR

1/Crim. 10325

In re Michael D. Poulin
on Habeas Corpus.

[Filed July 12, 1972]

Petition for writ of habeas corpus and motion for leave to produce additional evidence on appeal.

OPINION

Petitioner was convicted in the San Mateo Superior Court after jury trial of violation of Penal Code section 12310 (explosion of a destructive device causing great bodily injury). His appeal from the judgment is now before this court.

Additionally, he filed petition for writ of habeas corpus, alleging that his conviction and confinement under sentence for that conviction are illegal because, he alleges, at the trial he was denied his right to counsel as guaranteed by the Sixth Amendment to

the United States Constitution. He also alleges failure of the trial judge to listen to his charges of inadequate representation by his counsel. The alleged denial of the right to counsel is based on his claim that the deputy public defender who represented him throughout the trial gave him inadequate representation and defense.

Both of these contentions and the exact grounds on which they are based are raised in his appeal, and are considered by the court there; for that reason this petition for writ of habeas corpus will be denied.

Neither in his petition nor on his appeal has petitioner claimed that his counsel inadequately represented him because of not raising the defense of diminished responsibility based upon an alleged mental condition. However, he filed herein a petition for leave to produce additional evidence on appeal. The proposed evidence consists of certain medical evidence, and the diagnosis of a psychiatrist who examined petitioner pending his trial, to the effect that petitioner was suffering under a diminished mental capacity. It is contended that defense counsel had knowledge of these matters and that his failure to raise the defense of diminished capacity at the trial demonstrates inadequacy of counsel.

The Attorney General and the District Attorney of San Mateo County filed certain statements concerning this matter which showed the necessity of the court having before it the statement of defense counsel particularly whether he knew of the alleged mental condition of his client. Said counsel refused on the

ground that for him to give a statement concerning the issue would be a violation of the attorney-client relationship, but if petitioner would waive his privilege counsel would give a statement concerning the matter.

This court then communicated with petitioner informing him that, if he would communicate with his former attorney and waive the privilege as to communications relevant to the issue of incompetence of counsel, the court would consider his motion to produce additional evidence as an amendment to his petition for writ of habeas corpus. Otherwise the court would deny his motion for additional evidence. Petitioner has informed the court that he refuses to make such waiver.

In view of his refusal to have all the facts relating to his contention available to the court, the motion for leave to produce additional evidence is denied. As all contentions raised in his petition are being considered on his appeal, the petition for writ of habeas corpus is denied.

Bray, J.*

We concur:

Devine, P. J.

Rattigan, J.

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*Retired Presiding Justice of the Court of Appeal sitting under assignment of the Chairman of the Judicial Council.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1644

J. B. GUNN,
Petitioner,

VS.

MICHAEL D. POULIN,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-1644

J. B. GUNN,
Petitioner,

vs.

MICHAEL D. POULIN,
Respondent.

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

THE DECISION BELOW SHOULD BE REVERSED AND THE CASE REMANDED FOR RECONSIDERATION IN LIGHT OF WAINWRIGHT v. SYKES.

After petitioner applied for a writ of certiorari the Court announced its opinion in *Wainwright v. Sykes,* ___ U.S. ___, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). *Sykes* repudiated the Ninth Circuit's view, expressed below, that *Francis v. Henderson,* 425 U.S. 536 (1976), and *Davis v. United States,* 411 U.S. 233 (1973), "were confined to pretrial objections to grand jury composition" and that "nothing in *Francis* pur-

ports to overrule *Fay* [*v. Noia,* 372 U.S. 391 (1963)], sub silentio or otherwise" (Pet. for Cert., App. A, p. v). Instead, *Sykes* validated the state's position: "The state protests that to overcome a failure to object properly at trial the prisoner must show 'cause' for the failure as well as 'actual prejudice' . . ." (Pet. for Cert., App. A, p. iv).

It is plain that the opinion below can neither be reconciled nor coexist with *Sykes.* Respondent's efforts to distinguish *Sykes* because it involved evidence excludable on Fifth Amendment rather than Sixth Amendment grounds and involved a failure to object before rather than during trial must fail. *Sykes* explicitly dealt with state rules requiring contemporaneous objections at trial and held:

> "We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that petitioner's confession be challenged *at trial* or not at all. . . ." 53 L.Ed.2d at 608, 97 S.Ct. at 2506. (Emphasis supplied.)

Petitioner insists that Sixth Amendment rights so surpass Fifth Amendment rights in importance that the former may be deliberately bypassed but not procedurally defaulted. If, as he suggests, not all federal rights are of equal stature, it is no less true that all failures to object to inadmissible evidence at trial have an equal impact on the state's administration of criminal justice: that of requiring unnecessary retrials and depriving prosecutors of timely opportunity to present alternative proofs. Assuming that the attorney-client privilege is constitu-

tionally compelled, its violation would not relieve the defendant of the obligation to object to evidence resulting from its breach. Moreover, it has never been established that petitioner's privilege was breached.

Respondent next urges that the state has forgiven his procedural default by considering his Sixth Amendment claim on appeal. The warden's petition points out that federal courts may not penalize a state's attempt to consider a federal claim made futile by a barren record resulting from the claimant's failure to object (Pet. for Cert., 9 n. 1).

None of this Court's decisions forecloses application of the *Sykes* rule to respondent's case. Nor does *Curry v. Wilson,* 405 F.2d 110, 112 (9th Cir. 1968), cited by respondent. While disallowing the state the benefit of the deliberate bypass doctrine because its appellate court overlooked the want of a trial objection in order to reach a federal claim, the Ninth Circuit nevertheless held the federal claim waived in *Curry* because defense counsel deliberately withheld objection. The difference between a "deliberate bypass" and a "'waiver' in the *Curry v. Wilson* sense," *Miller v. Carter,* 434 F.2d 824, 825 (9th Cir. 1970), awaits full elaboration.

At all events, the Ninth Circuit did not hold that the state was estopped from claiming waiver. On the contrary, that court observed "there is no suggestion that the failure to object amounted to a tactically-inspired, or otherwise deliberate, bypass of state procedures" (Pet. for Cert., App. A, p. ii).

Finally, respondent argues that his case is inappropriate for review in this Court because there has been no factual inquiry into the "cause" of his attorney's failure to object. This point has some merit.

Ultimately, this case is likely to be decided upon the basis of testimony given by respondent's trial attorney at a future evidentiary hearing in the United States District Court. It may well be that defense counsel will explain his failure to object on the ground that the jurors were closer to Poulin when he incriminated himself than was the bailiff who heard and recounted the admission. If counsel does not so testify, "cause" and the existence of the attorney-client privilege may be established.

Should this Court simply deny the petition, however, the District Court will feel bound by the Ninth Circuit's opinion to reassemble the entire cast of Poulin's 1971 state trial in order to determine whether "any other persons" overheard his incriminating remark to his attorney (Pet. for Cert., App. A, p. iii). The State of California will be spared this unnecessary extravaganza, occasioned by Poulin's failure to object six years ago, if this Court grants the petition for a writ of certiorari, reverses the decision below, and remands the case for reconsideration in light of

Wainwright v. Sykes. Only then can we be assured that *Sykes* will be spared the same grudging interpretation given *Davis v. United States* and *Francis v. Henderson* in the opinion below.

Dated, October 17, 1977

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